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86-2047

In the

Supreme Court of the United States

OCTOBER TERM, 1986

Raphael Johnson, Ida Johnson
and Robert Johnson ..... *Petitioners*

VS.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I. THE FAILURE OF A STATES' JUDICIAL SYSTEM TO ENFORCE RULES OF CRIMINAL PROCEDURE DESIGNED TO PROTECT A CRIMINAL DEFENDANTS' CONSTITUTIONAL RIGHT TO ACCESS TO EVIDENCE VIOLATES THAT DEFENDANTS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AS STATED IN *CALIFORNIA v. TROMBETTA*, 467 U.S. 479, 104 S.Ct. 2528, 81 L. Ed 2d 413 (1984); *UNITED STATES v. HEIDEN*, 628 F2d 1139 (9TH CIR 1979).

II. THE FAILURE OF A STATES' JUDICIAL SYSTEM TO PROTECT A CRIMINAL DEFENDANTS CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES IS A VIOLATION OF THAT DEFENDANTS FOURTH AMENDMENT RIGHTS AS DEFINED BY *COOLIDGE v. NEW HAMPSHIRE*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed 2d 564 (1971) AND *ARKANSAS v. SANDERS*, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed 2d 235 (1979).

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners, Raphael Johnson, Ida Johnson and Robert Johnson (hereinafter called petitioners) are facing terms in the Arkansas Department of Corrections and/or fines hereby petition for a writ of certiorari to review the affirmance of their convictions and sentences by the Supreme Court of Arkansas.

OPINIONS BELOW

This petition is a direct request for review of the affirmance of the trial court judgment and sentence in this case by the Supreme Court of Arkansas. The only opinion of the Supreme Court of Arkansas is reported in *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160 (1987). A copy of the opinion is included in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on February 23, 1987. The petition for rehearing was denied on March 23, 1987. The original certiorari petition was due on May 22, 1987. A motion for extension of time to file the petition for certiorari was granted extending the time to file this petition until June 22, 1987.

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257 (3), with petitioners asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States through the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FOURTH AMENDMENT, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT, United States Constitution:

> No person shall be deprived of life, liberty, or property, without due process of law; . . .

FOURTEENTH AMENDMENT, United States Constitution:

> Section 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARCrP RULE 4.1 Authority to Arrest Without Warrant

> (a) A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed (i) a felony . . . (iii) any violation of law in the officer's presence. . . .

ARCrP RULE 15.1 Custody of Seized Things: Retention by seizing officer

> "In all cases of seizure the law enforcement officer making the seizure shall provide for the appropriate safekeeping of the things seized."

ARCrP RULE 15.2(g) Disposition of Contraband and Unclaimed Goods

> "At such time as the Court finds that there is no further need for custody of the seized things and if no motion for return or restoration of the seized things has been made the court shall order the thing to be delivered to the officials charged with responsibility under the applicable laws for the . . . destruction or other disposition of contraband . . . in official custody"

ARCrP RULE 15.4 Custody of Seized Things: Report of Seizure

> (a) In all cases of seizure other than pursuant to a search warrant, the officer making the seizure shall, as soon thereafter as is reasonably possible, report in writing the fact and circumstances of the seizure, with a list of things to the court before which the defendant will be brought for first appearance, or, if no arrest is made to a court having jurisdiction to entertain proceedings respecting the offense disclosed by the seizure.
>
> (b) A copy of the list shall be given to the defendant or his counsel and the list shall be given such public notice as may be directed by a court of competent jurisdiction.

ARCrP RULE 16.2 Motions to Suppress Evidence

(e) Determination. A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:

(i) the importance of the particular interest violated;

(ii) the extent of deviation from lawful conduct;

(iii) the extent to which the violation was willful;

(iv) the extent to which privacy was invaded;

(v) the extent to which exclusion will tend to prevent violations of these rules;

(vi) whether, but for the violation, such evidence would have been discovered; and

(vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

82-2617. Criminal penalties.

(a) Except as authorized by this Act it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(iv) A controlled substance classified in schedule VI shall be guilty of a felony and be: (a) imprisoned no less than four (4) nor more than ten (10) years and/or fined no more than twenty-five thousand dollars ($25,000) if the quantity of the substance is less than ten (10) pounds; or (b) imprisoned for no less than five (5) years nor more than twenty (20) years and/or fined no less than fifteen

thousand dollars ($15,000) if the quantity of such substance is ten (10) pounds or more but less than one hundred (100) pounds; or (c) imprisoned for no less than six (6) years nor more than thirty (30) years and/or fined no less than fifteen thousand dollars ($15,000) nor more than one hundred thousand dollars ($100,000) if the quantity of the substance is one hundred (100) pounds or more. For all purposes other than disposition, this offense is a class C felony.

STATEMENT OF THE CASE

Sometime in early August, 1985, Arkansas State Police Lt. Carroll B. Evans was informed by unnamed Texas police authorities that an undisclosed confidential informant had revealed to them that the defendants were growing marijuana on a 10 acre tract of land in rural Van Buren County, Arkansas. On several occasions Lt. Evans spoke with the Texas authorities but at no time did he explore with them the possibility of obtaining a search warrant for the defendants property, based on the information he possessed. (Appendix F, pg F-1) Lt. Evans then relayed this information to Van Buren County Sheriff Gus Anglin. Approximately one month after the initial conversation with the Texas authorities, on September 5, 1985 at approximately 9:00 a.m., from a force of eleven officers, the Arkansas State Police and the Van Buren County Sheriff's Department proceeded to the vicinity of the defendants's property. Lt. Evans and Sheriff Anglin brought up the rear in Sheriff Anglin's patrol car with Sheriff Anglin driving. They had no search warrant. A helicopter with a deputy sheriff on board was to attempt to obtain an aerial view of the defendants' property once the officers had stationed themselves in positions surrounding the property. According to the defendants, the helicopter hovered over the house and made two passes over the garden prior to any police officers arriving at the property. The Police officers, testified that the helicopter did not pass over the defendants' property prior to the Police intrusion.

According to Lt. Evans and Sheriff Anglin as they passed by the defendants property in their patrol car traveling at approximately 15 to 20 miles per hour they each saw the defendant Raphael Johnson walking across the yard between his house and a barn located upon the curtilage of the property. Mr. Johnson was observed by the officers at a distance of 30 to 40 feet for 3-5 seconds before losing sight of him. According to Sheriff Anglin, he saw the defendant carrying seven marijuana plants cradled in his

arms. Lt. Evans also identified the plants he saw as being marijuana plants. Raphael Johnson testified that he had just pulled up some weeds from a small garden next to his house and carried them across the yard and through the barn, to a compost pile. The two officers then stopped and backed onto the Johnson property and followed Raphael Johnson on foot. Raphael Johnson was last seen entering the barn and was next seen by the officers some 50-70 yards beyond the barn in an adjacent field. He did not have marijuana in his physical possession. Sheriff Anglin had seen seven stalks of what appeared to be marijuana in the barn when he walked through the barn but he did not see the defendant discard the marijuana there. Sheriff Anglin did not seize these seven plants in the barn, but instead waited for Raphael Johnson to sign a consent to search before going back into the barn and seizing the seven plants. Other plants which were not believed to be marijuana were observed in the barn. Raphael Johnson was placed under arrest for possession of marijuana, outside of the barn, after walking back up to the barn where he met Sheriff Anglin and Lt. Evans. (Appendix F-2)

Immediately after arresting the defendant, Raphael Johnson, the officers attention was drawn by the sound of a tractor in a garden located on the curtilage of the Johnson property, some 75-100 yards distance. In that area they said they could see someone mowing down what appeared to be marijuana. Sheriff Anglin went immediately to the garden where he arrested the defendant, Robert Johnson. Sheriff Anglin brought Robert Johnson back to the area near the barn where Lt. Evans was holding Raphael Johnson. The remaining police officers arrived and these two defendants were verbally given their Miranda Rights. Lt. Evans, Sheriff Anglin, Arkansas State Police Sgt. M.L. Tester and Deputy Sheriff Isaccs, who had just arrived testified that they heard the defendants orally consent to search the house, vehicles and lands. Each of the defendants subsequently denied orally consenting to any search. Arkansas State Police Sgt. Dan Short who verbally gave

Raphael Johnson and Robert Johnson their Miranda Rights and was present with the defendants and the other police officers outside the house testified that he did not recall the defendants giving oral consent to search.

However, no seizure of evidence in the barn, or in the garden or in any area took place until a signed consent to search was obtained from Raphael Johnson three and a half hours later at the Van Buren County jail. The consent to search form signed by the defendant, Raphael Johnson, left the place to be searched blank. A partial legal description of the 10 acre tract was inserted by a State Police officer several days after the search and seizure was conducted. The consent form also did not describe with particularity the things to be seized. Raphael Johnson testified that he did not understand what the document was needed for when he signed it. He further testified that he was concerned about the lack of scope of the search to be conducted since the document was not filled in when he signed it.

The police officers remained on the defendants' property for three and a half hours, until they were notified by telephone in the home of the defendants that a written consent had been obtained. The officers then seized items from the defendants home, in the vehicles, the plants in the garden and woods as well as the seven plants located inside the barn. State Police Sgt. M.L. Tester took possession of the items found in the home and vehicles and assigned to them Evidence numbers MLT E-1-7 and transported these items of evidence to the Van Buren County jail. The plants were harvested from the garden and wooded area, then counted and hauled to the Van Buren County jail. The seven plants in the barn were retrieved and placed with the other plants already harvested.

In the course of harvesting plants from the garden and adjacent wooded area Lt. Evans photographed this area to depict what could be seen by he and Sheriff Anglin when

they viewed the garden area from the point where they arrested Raphael Johnson. He also photographed what appeared to be marijuana plants lying on the ground in the garden as well as other garden variety plants such as corn and pole beans. No photograph of the seven plants found in the barn was obtained to depict what Raphael Johnson was accused of carrying across the yard when Lt. Evans and Sheriff Anglin drove by.

Sgt. M. L. Tester picked leaves from the plants that were harvested and placed them in a grocery sack. He also took an undetermined quantity from the seven plants and commingled this sample with the sample of the 1015 plants found in the garden and adjacent wooded area by placing it in the same grocery sack. (Appendix H, pg H-1) No evidence number was assigned to the samples of the plants that were taken at that time. No photographs were taken of the specific plants that were sampled. (Appendix H, pg H-5) Officer Tester did not preserve a single representative plant or attempt to sample a random number of plants. (Appendix H) He did not know how many plants he removed samples from. (Appendix H, pg H-2) Sgt. M.L. Tester stated that it was standard procedure of the Arkansas State Police to assign an evidence number to each item of evidence and make out a report indicating the numbers assigned and describing the items. However, he did not follow this procedure and the first indications that he had of an evidence sample entitled MLT E-8 was on an evidence submission sheet dated 6 days after the seizure. Sgt. Tester stated that after taking custody of the evidence, including all the plants, the evidence was transported to the Van Buren County jail. On the same day, at the jail, all the plants, including the seven plants found in the barn, were destroyed. (Appendix H, pg H-3) No court order was obtained authorizing the destruction of the evidence as required by ARCrP RULE 15.2 (g). No report of seizure was made to a court as required by ARCrP RULE 15.4.

Sgt. Tester then took the sample in the grocery sack, estimated to be 4.8 ounces of vegetable matter, to his office

in Russellville, AR where he made a 1.5 ounce sub-sample of the remains of the plants seized on the Johnson property. This sample was given the evidence number MLT E-8 when it was submitted to the Arkansas State Crime Laboratory on September 11, 1985. (Appendix H, pg H-6)

Defendants filed motions for discovery on September 24, 1985 requesting, among other things, lists of all tangible objects, photographs, reports of experts, scientific tests to be used at any hearing, a copy of all relevant material obtained from a search or seizure of the defendant or their premises, any material or information within the knowledge of the prosecuting attorney which tends to negate the guilt of the defendant or would tend to reduce the punishment and any writings, material or information in the possession of other governmental personnel which would be discoverable of in the possession of the prosecuting attorney. (T. 10-11) The defendants employed an independent testing laboratory to test the substances seized and obtained a Court Order requiring the State Police to turn over all substances to that laboratory. (T. 45) The defendants filed a written motion for suppression of the evidence alleging therein that the State through the actions of the law enforcement agencies involved in their case had substantially violated the 4th and 14th Amendments to the U.S. Constitution by failing to obtain a search warrant, illegally intruding upon their property to effect arrested the defendants, conducted illegal searches and seizures without having consent or were justified by an exception to the search warrant requirement and after seizing evidence, failed to safekeep the evidence, prejudicing the defendants ability to conduct a meaningful defense. (T. 49-60) ARCrP 16.2 was cited to the court as requiring suppression under these circumstances. At the suppression hearing it was discovered that MLT E-8 consisted of more than the 1.5 ounce sample reported to the defendants by the prosecuting attorney in discovery and that the remaining 3.3 ounces of MLT E-8 had not been turned over to the defendants independent drug lab as previously ordered by the court. (Appendix G, H and I)

The trial court granted suppression of all items seized inside the home and vehicles, but allowed introduction of the substances and items seized inside based on the plain view doctrine and consent. The trial court found that the officers had probably cause to come onto the defendants property, to affect an arrest and that the destruction of evidence did not prejudice the defendants in preparing their defense. The court further found that the random sample was valid and that the chain of custody of evidence sample MLT E-8 was preserved. The court ordered that all remaining samples of controlled substance in the State's possession be turned over to the defendant's independent drug testing laboratory on or before February 28, 1986 so that the defendants chemist could test the remains of MLT E-8 prior to the trial. (Appendix E and I) (T. 64-65) The State had attempted to introduce a State Drug lab test of the 3.3 ounces but withdrew the sample and test results due the defendants objection. (Appendix G, pg G-13)

The State did not comply with th second court order dated February 25, 1986 to deliver the remains of MLT E-8 to the independent lab by the specified date and did not introduce the 3.3 ounce sample at the trial on March 18, 1986. The defendants renewed their objection to the introduction of MLT E-8, being the 1.5 ounce sub-sample at the trial and said objection was overruled. (Appendix K) The only tangible evidence of the marijuana the defendants were accused of manufacturing introduced at the trial was the 1.5 ounce sub-sample along with photographs taken on the defendants property, and a State Crime lab report on the 1.5 ounce sub-sample. (T. 491)

The State dismissed the possession with intent to deliver charges against the defendants prior to selecting the jury and the defendants were tried only on the charge of manufacturing a controlled substance. (T. 454) The jury found the defendants guilty based upon the evidence presented to them and fixed Raphael Johnson's sentence to 4 years in the penitentiary and a fine of $10,000.00; (T. 63)

Robert Johnson was sentenced to 10 years in the penitentiary and a fine of $5,000.00; (T. 91) and Ida Johnson to a fine of $2,000.00. (T. 79) The defendants took a consolidated appeal to the Arkansas Supreme Court and alleged as grounds for reversal (1) The trial court erred in refusing to suppress the evidence seized in a warrantless search of the defendants' property when the law enforcement officers failed to make a diligent effort to obtain a search warrant. (2) The trial court erred in refusing to suppress evidence seized following the arrest of Raphael Johnson since no other evidence was seized incident to the arrest of Raphael Johnson or in plain view of the arresting officers. (3) The trial court erred in allowing evidence to be introduced based on an invalid consent to search the defendants' property. (4) The trial court erred in refusing to suppress States Trial Exhibit #9 (MLT E-8-1.5 ounce sub-sample) due to the fact that the law enforcement officers, failed to safekeep the evidence, commingled the evidence from different locations, destroyed evidence without judicial authority, failed to preserve adequate secondary evidence and failed to maintain the chain of custody of evidence all of which substantially prejudiced the defendants ability to adequately defend themselves. (Appendix C)

Briefs were submitted to the Arkansas Supreme Court and its opinion affirming the rulings of the trial court was entered on February 23, 1987. (Appendix A) The opinion expressed no response to the defendants first argument that the police had forgone an opportunity to obtain a search warrant, but did conclude that the arrest of Raphael Johnson, as well as the other defendants, was "unquestionably valid." Further, that the allegations of the defendants concerning a pretextual invasion of their property based on the police officers alleged sighting marijuana from the public highway being carried by Raphael Johnson was "absurd." As to the question of the validity of the consent to search supposedly given, the state in its brief had conceded that it would be hard pressed to

prove a valid consent was given, therefore no opinion was expressed. The court found that the requirements for the plain view doctrine as defined in *Coolidge v. New Hampshire*, (cite omitted) had been met and specifically that the inadvertment discovery requirement only meant that the police did not have sufficient information immediately prior to the discovery to establish probable cause to obtain a search warrant. Finally the Arkansas Supreme Court ruled that the police officers destruction of evidence, and failure to comply with judicial authorization for destruction of evidence and reporting requirements of the Arkansas Rules of Criminal Procedure did not substantially prejudice the defendants because the evidence introduced at the trial was "overwhelming" and, that "the character and quality of the plants would make no difference in a conviction for manufacturing marijuana." As to the issue of commingling the evidence samples the appellate court found that this was harmless error "since all the evidence was properly admissible." Finally, since the defendants were unable to show that the evidence sample MLT E-8 had been tampered with or any other "suspicious circumstances" the trial judge had not abused his discretion in finding the chain of custody intact.

Defendants filed a petition for rehearing again raising the issue of substantial prejudice in the handling of evidence. The Petition for rehearing was denied on March 23, 1987. (Appendix B)

ARGUMENT I

The question presented is whether the failure of a state trial court and later a state appellate court—to prevent the State from using questionable secondary evidence allegedly seized from a constitutionally protected area as proof of the police authorities right to intrude upon the petitioners' property without a search warrant violates due process requirements of the U.S. Constitution. Arkansas Rules of Criminal Procedure Rule 16.2 (e) states:

> (e) Determination. A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:
>
> (i) the importance of the particular interest violated;
>
> (ii) the extent of deviation from lawful conduct;
>
> (iii) the extent to which the violation was willful;
>
> (iv) the extent to which privacy was invaded;
>
> (v) the extent to which exclusion will tend to prevent violations of these rules;
>
> (vi) whether, but for the violation, such evidence would have been discovered; and
>
> (vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

It is the petitioners earnest contention that the violations of various Arkansas Rules of Criminal procedure guaranteeing access to evidence and maintaining the

integrity of the evidence constituted "substantial prejudice" and suppression of the evidence obtained from them is required by the Constitution of the United States.

ARCrP Rule 15.1 states that "In all cases of seizure the law enforcement officer making the seizure shall provide for the appropriate safekeeping of the things seized." ARCrP Rule 15.2 (g) states that "At such time as the Court finds that there is no further need for custody of the seized things and if no motion for return or restoration of the seized things has been made the court shall order the thing to be delivered to the officials charged with responsibility under the applicable laws for the . . . destruction or other disposition of contraband . . . " ARCrP Rule 15.4 states:

> (a) In all cases of seizure other than pursuant to a search warrant, the officer making the seizure shall, as soon thereafter as is reasonably possible, report in writing the fact and circumstances of the seizure, with a list of things to the court before which the defendant will be brought for first appearance, or, if no arrest is made to a court having jurisdiction to entertain proceedings respecting the offense disclosed by the seizure.
>
> (b) A copy of the list shall be given to the defendant or his counsel and the list shall be given such public notice as may be directed by a court of competent jurisdiction.

Petitioners know of no statutory authority or written policy or practice governing the destruction of evidence or the preservation of secondary evidence in Arkansas other than these rules. The obvious purpose of the rules is to require preservation until a court authorizes disposal and gives the defendant an opportunity to inspect and have independent tests and examinations performed upon evidence seized from him which is intended for use by the state in a trial against him. Such a practice affords the defendant a reasonable chance to develop the exculatory value of the evidence.

In the States' case against the petitioners, the prejudice to them was substantial since the law enforcement officers could not have obtained any evidence from the petitioners to base a charge of manufacturing a controlled substance on, but for, their visual identification of the seven plants Raphael Johnson was accused of having in his possession while walking across his yard on the morning of September 5, 1985. Other than the testimony of the officers who were basing their intrusion on this visual identification the sole item of evidence remaining from the entire 1,015 plants which the state placed in evidence against the defendant was a 1.5 oz. sample that could not be traced to the seven plants. Due to the fact that these same officers failed to preserve an independent sample of the seven plants, and took no photographs of them, there remained not one shred of evidence the petitioners could utilize which could rebut the statements of the police officers that what they saw in their 3 to 5 second sighting was marijuana. It came down to the word of Raphael Johnson against the word of officers. Surely the constitutional protection against unreasonable searches and seizures requires more stringent proof than that.

This Court held in *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) that under the Due Process clause of the Fourteenth Amendment criminal prosecutions must comport with prevailing notions of fundamental fairness. In doing so the Court stated that a defendant has a constitutionally guaranteed right to have access to evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. This court said that . . . "when evidence is destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing . . . the States most probative evidence. Also, it was stated that the Constitutional duty of the States to preserve evidence is limited to evidence that might be expected to play a significant role in the suspects defense. The test was whether the evidence possessed an exculpatory value that

was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

The exculpatory value of this evidence is only assessable under the facts of the case by direct examination of it, or a reliable sample thereof. Given that it was the sighting of these seven plants upon which the police officers based their right to intrude it would have been reasonable for them to assume that the integrity of that evidence should be maintained in order to counter a claim of pretext to invade. To place the evidence in the state it is now in constitutes no less than an impairment of judicial integrity.

The test enunciated in *Trombetta*, supra, was most certainly met by the petitioners as they sought to demonstrate at each stage of their prosecution how crucial the evidence they were seeking access to was to their defense. At the suppression hearing under either theory presented by the State the character of the seven plants was pivotal. Under the plain view doctrine there is a requirement that the incriminating nature of the evidence is immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). If the defense had been afforded access to the seven plants then the testimony of the defendant Raphael Johnson could have been supported by tangible evidence. Under the arrest with probable cause theory tangible proof that what Raphael Johnson was carrying was not a controlled substance or did not have the appearance of marijuana would eliminate probable cause. Absent a basis for legal intrusion all evidence seized subsequent to the intrusion would constitute "fruit of the poisonous tree" and be subject to suppression. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 107, 9 L.Ed.2d 441 (1963); *Durham v. State*, 251 Ark. 164, 471 S.W.2d 527 (1971).

The petitioners attempted to have all the remaining evidence tested. However, the States voluntary

suppression of the 3.3 oz. remaining portion of Evidence Sample MLT E-8 precluded the petitioners from examining two-thirds of the remainder of the substances seized on their property rendering their right to an independent test meaningless. This conduct, along with commingling the sample from the fields with the sample of seven plants and failing to photograph the seven plants rendered the defendants ability to obtain comparable evidence by other reasonable available means impossible. Commingling is the equivalent of destruction for evidentiary purposes. *People v. O'Hearn*, 142 Cal. App. 3rd 566, 191 Cal. Rptr. 481 (1983).

In *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979) it was said that the most important part of an analysis of prejudice when dealing with destruction of the primary evidence was an evaluation of the reliability or trustworthiness of the remaining secondary evidence. In that case photographs were taken of dynamite which made it identifiable and thus, reliable. In the petitioner's case not only the primary evidence, but the secondary evidence was suppressed by the State without affording the defendants a meaningful opportunity to test it. The only secondary evidence was the commingled sample which lacked reliability. The State had no prevailing reason to destroy the evidence as in *Loud Hawk* where the dynamite constituted a danger while in storage. Not one photograph of the seven plants was taken although photographs were taken of other plants found later that day on the defendants property. In *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974) Judge Merrill stated in his concurring opinion that, "I concur in Judge Wallace's opinion but wish to lend emphasis to his warning in footnote 1. Cases will arise where the contraband destroyed does have potential usefulness as evidence not possessed by the sample retained. When this occurs and destruction is shown to have been prejudicial, reversal is called for. I would say that the practice apparently followed in the Southern District invites reversal. I would urge that it be halted: that destruction of evidence follow only after petition and order directed to the particular items to be destroyed, with notice

to the defendant and opportunity to petition for access to that which has been seized."

The elliptical reasoning of Arkansas Supreme Court that it made no difference to prove the character of the plants in a prosecution for manufacturing a controlled substance totally ignores the fact that the petitioners were attempting to prove by every means left to them that the seven plants were not marijuana. Had they been afforded this chance the trial court could have reasonablay concluded that the police officers did not have probable cause or justification to intrude, and none of the evidence which they found could have been "properly admissible" since it would be "fruit of the poisonous tree".

This Court should grant certiorari on the issue of whether the defendants constitutional rights to due process were violated by the state courts failure to enforce Rules of Criminal Procedure designed to guarantee these petitioners access to evidence and right to present a meaningful defense. If so, then the Court should address whether the prejudice to the defendants was substantial or truly harmless beyond a reasonable doubt or at least vacate the judgment of the Arkansas Supreme Court and remand the case to them to determine if the prejudice to the petitioners was harmless beyond a reasonable doubt.

ARGUMENT II

The question here presented is whether the actions of the police officers in failing to investigate the available information possessed by the Texas law enforcement authorities in determining that probable cause to obtain a search warrant did not exist constituted a violation of the petitioners Fourth Amendment right to be free from unreasonable searches and seizures. It has been said on numerous occasions that in the ordinary case a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness

of a search, assessed in the light of the surrounding circumstances is not a substitute for the judicial warrant required under the Fourth Amendment. *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).

Searches and seizues without a warrant are considered unreasonable *per se* under the Fourth Amendment to the U.S. Constitution. Furthermore, searches and seizures conducted pursuant to one of the few situations in which a search may be conducted without a search warrant are strictly limited in scope and the burden is on the State to show the reasonableness of the search. *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). In the area of searches conducted on private property, as in the petitioners case, the reasonableness and need for applying an exception to the warrant clause should be strictly scrutinized. Here there is no "diminished expectation of privacy," so the prevailing interest to be protected is the sanctity of the home.

In *Durham v. State*, 251 Ark. 164, 471 S.W.2d 527 (1971) the Arkansas Supreme Court, citing *McDowell v. United States*, 388 F.2d 853 (9th Cir. 1968), held that the yard and garden used for family purposes was within the curtilage of the home and as such afforded the same constitutional protection as the home itself. In *Sanders v. State*, 264 Ark. 433, 572 S.W.2d 397 (1978) the definition of curtilage was stated as:

> "It has been said that the curtilage of a dwelling is a space necessary and convenient, habitually used for family purposes and for the carrying on of domestic employment; it is the yard, garden, or field which is near to and used in connection with the dwelling. Accordingly, a barn has been held to be within the curtilage of a house although it was 70 to 80 yards away and surrounded by a fence. And a barn has been held to be within the curtilage of a dwelling house on a small farm, where there were tracks of vehicles and

> footprints leading both to the house and to the barn, and there was a driveway between the barn and the house."

In the petitioners case Arkansas State Police Lt. C.B. Evans candidly admitted that he did not explore the possibility of obtaining a search warrant based upon the information possessed by an undisclosed "confidential informant" of certain Texas police authorities with whom he had communicated on two or three occasions during the month prior to the warrantless intrusion upon the petitioners' property. Prior to the day he and the other officers arrived upon the property he had made a reconnaissance trip by the petitioners' property. He noted that a "privacy fence" was constructed around an area later determined to be a garden and could observe no suspicious activity.

A mere conclusory statement by the police officer in charge that he didn't think he had probable cause to obtain a search warrant did not abrogate him from investigating available information with a view to obtaining a search warrant in the months time he had prior to the intrusion. Clearly, from the testimony of Lt. Evans, the search to be conducted was planned from the start to be based on an aerial surveillance. The delay of a month was caused by waiting for the availability of a helicopter. No exigent circumstances existed which justified foregoing a judicial determination of the probative value of the information possessed by the Texas authorities.

The Arkansas Supreme Court expressed no opinion as to this contention although the petitioners specifically raised the issue in their brief. Apparently that Court is satisfied with this search as long as it fits within the bounds of some recognized exception. However, it has been stated that the opportunity to obtain a warrant is one of the factors to be weighed in determining reasonableness of a search. *Vale v. Louisiana*, 399 U.S. 30, 40, 90 S.Ct. 1969, 1975, 26 L.Ed.2d 409 (1970). In *United Staes v. Scheffer*, 463 F.2d 567

(5th Cir.) cert. denied, 409 U.S. 984, 93 S.Ct. 324, 34 L.Ed.2d 248 (1972) the governments contention that its warrantless search was justified by exigent circumstances was rejected because there was no plausible explanation for the failure to obtain a warrant. In *United States v. Chuke*, 554 F.2d 260 (6th Cir. 1977) the court there stated:

> "Where law enforcement officers have squandered an overt opportunity to obtain a warrant antecedent to an otherwise acceptable search (justified by exigent circumstances incident to a valid arrest), there must be a showing of compelling "countervailing factors" to sustain the constitutionality of the suspect intrusion . . . If a defendants allegation of deliberate bypass of a warrant is supported by a finding that a realistic opportunity existed to procure one, as in this case, the Government must come forward with objective evidence tending to justify this deviation from normal police procedure."

The fact that Lt. Evans did not explore the possibility of obtaining a search warrant based on the Texas informants information and did not inquire about the informants reliability propounds against the reasonableness of the search here based on exigent circumstances incident to an arrest. There was no attempt by the State to show any countervailing factors to sustain the constitutionality of this intrusion.

If police authorities are permitted to direct their criminal investigations toward the loophole of an exception to the search warrant requirement soon the exception will become the rule and search warrants will be a thing of the past. Then the judgment of one police officer will have been substituted for an independent judicial determination of probable cause to search.

In the instant case a so-called limited search based on the plain view exception became a general search encompassing the entire 10 acres of the petitioners,

including their home, curtilage, outbuildings and vehicles parked thereon. The State called on the plain view doctrine, search incident to an arrest, and consent search in attempting to justify the ever widening scope of this search. The search was patently unreasonable and the evidence seized thereby should have been suppressed.

This Court should grant Certiorari, set this matter for argument and declare that such a scheme of invasion violates the Fourth Amendment prohibition against unreasonable searches and seizures.

CONCLUSION

The petitioners were sentenced to terms in the penitentiary and/or fines based on evidence that was unreliable. They were not afforded as reasonable opportunity to conduct a meaningful defense, especially at the suppression stage when they were denied suppression of the remaining evidence after proving that potentially exculpatory evidence had been destroyed. The petitioners due process rights were violated and they were afforded no other reasonable means to support their motion to suppress. The searches and seizures of evidence were conducted without a search warrant and in such an unreasonable manner to violate their Fourth Amendment rights. All the evidence seized or obtained as a result of these violations should have been suppressed.

For the foregoing reasons this petition for certiorari should be granted; the matter should be set for briefing and arguments; and, the conviction and sentence set aside and the matter remanded to the Arkansas courts for retrial.

Respectfully submitted,

STEPHEN E. JAMES, P.A.
108 S. Court Street
Clinton, Arkansas 72031
(501) 745-2468

BY: STEPHEN E. JAMES

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Stephen E. James, counsel for petitioners herein, do hereby certify that a sufficient number of true and correct copies of the foregoing petition and accompanying appendix have been served on opposing counsel this 19th day of June, 1987, by mailing said copies, first class postage prepaid, to the Honorable J. Steven Clark, Office of the Attorney General, State Capitol, Little Rock, Arkansas 72201.

/s/ Stephen E. James

APPENDIX A

SUPREME COURT OF ARKANSAS
NO. CR 86-159

Opinion Delivered February 23, 1987

RAPHAEL JOHNSON, IDA JOHNSON, AND ROBERT JOHNSON, ... APPELLANTS,	APPEAL FROM VAN BUREN CIRCUIT COURT, #CR 85-109 TO 85-114; HON. GEORGE F. HARTJE, JUDGE.
VS.	
STATE OF ARKANSAS, ... APPELLEE.	*AFFIRMED.*

JACK HOLT, JR., *Chief Justice*

Raphael, Ida and Robert Johnson seek reversal of their convictions for manufacturing marijuana because of the admission into evidence at trial of marijuana they contend was illegally seized from their property. The Johnsons also contend that they were prejudiced by the police's pretrial handling and disposal of the marijuana. We find no merit in the Johnsons' arguments and affirm.

Police testified at a suppression hearing and later at trial that the discovery and subsequent seizure of marijuana on the Johnsons' property occurred in the following manner. Following an informant's tip that marijuana was being grown on the ten acres surrounding the Johnsons' residence, the police planned a helicopter inspection of the property. Prior to the arrival of the helicopter, two law enforcement officers were driving by the property on a public road and spotted Raphael Johnson carrying seven stalks of marijuana cradled in his arms. The officers said they were driving 15 to 20 miles per hour and that Raphael was only 25 to 30 feet away. Raphael began walking faster toward a barn after he realized he had been

seen. The officers then drove onto the property, followed Raphael on foot through the barn, and arrested him, now empty-handed, about 50 yards behind the barn.

After Raphael was arrested, the officers heard a tractor start up and turned to see Raphael's son, Robert Johnson, 50 to 75 yards away, mowing down what looked like marijjana plants. Robert was also arrested.

The officers testified that the Johnsons orally consented to a search of the premises at that time, although the testimony as to which officer received the consent was unclear and the Johnsons denied consenting. The Johnsons were taken to the police station where Raphael signed a permission to search form. The space on the form for the property location was left blank. According to the officers, 1015 marijuana plants, including the seven stalks found in the barn, were seized after the consent form was signed. Random samples were saved for testing and the remainder was burned without a court order.

The trial court ruled that the state could introduce all evidence of the marijuana found in the barn and growing on the property, including police testimony, photographs, and the samples which tested positive for marijuana, but excluded any evidence found in an accompanying search of the Johnsons' house and vehicles. Raphael was sentenced to four years imprisonment and fined $10,000; Robert was sentenced to ten years and fined $5,000; and Ida Johnson was fined $2,000. The trial court's rulings were correct.

All searches conducted without a valid warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The Johnsons contend that the search was invalid because the police had no warrant and no exception to the warrant requirement applies. We disagree. The officers witnessed Raphael Johnson carrying seven freshly-cut marijuana stalks across his yard, clearly

giving them reasonable cause to believe he was committing a felony and thereby authorized them to arrest Johnson without a warrant. A.R.Cr.P. Rule 4.1(a)(i). At that time, the officers were on a public road and Johnson was in public view, making it permissible to enter the premises and pursue him to make the arrest. *United States v. Santana*, 427 U.S. 38 (1976).

From the vantage point where Raphael Johnson was arrested, the growing marijuana was clearly visible to the officers. The observation of evidence in plain view is not a search and therefore the resulting seizure is not the result of an unreasonable search. *Kelley v. State*, 216 Ark. 31, 545 S.W.2d 919 (1977); A.R.Cr.P. Rule 14.4. "The basic test is whether the officer had a right to be in the position he was when the objects fell into his plain view." *Kelley, supra.* The officers obviously had a right to be on the public road, and, as stated, had a right to enter the property to make the arrest, bringing the marijuana into view.

The Johnsons argue that this situation does not satisfy the plain view exception's three-prong test. That test permits the admission of seized evidence only when 1) the initial intrusion was lawful, 2) the discovery of the evidence was inadvertent, and 3) the incriminating nature of the evidence was immediately apparent. *McQueen v. State*, 283 Ark. 282, 675 S.W.2d 358 (1984); *Coolidge, supra.* The Johnsons question the inadvertence of the police discovery, since the officers were setting up a surveillance for marijuana when Raphael was spotted. Regardless of why the police were driving by the property, however, no intrusion at all had occurred before the marijuana was first seen. To hold that police cannot seize marijuana that is in plain view from the highway and later after they have made unquestionably valid arrests would place too much emphasis on the inadvertence requirement.

The real concern expressed in *Coolidge* was with "a *planned* warrantless seizure." *Id.*, at p. 471, fn. 27. The inadvertence requirement has generally been interpreted

to mean that "immediately prior to the discovery, the police lacked sufficient information to establish probable cause to obtain a warrant to search for the object." *State v. Cote*, 126 N.H. 514, 493 A.2d 1170 (1985); LaFave, *Search and Seizure*, § 6.7(c) (2d ed. 1987). Inadvertence does not "encompass total surprise" or mean "unexpected." *State v. McCurry*, 587 S.W.2d 337 (Mo. App. 1979); *State v. Preston*, 583 S.W.2d 577 (Mo. App. 1979). It is absurd to believe that the officers planned in advance to see Johnson walking on this property near the highway carrying an armful of marijuana, use that as a pretext to follow him onto the premises to make the arrest, and at that time seize the marijuana they expected to find there. The fact that the officers had an informant's tip that marijuana could be growing there does not make the sighting of the marijuana "advertent" in these circumstances.

The Johnsons contend that they did not consent to the search of their property. The state concedes that the consent to the search in this case was questionable. Because we hold the seizure of the marijuana was justified on other grounds, however, we need not reach this issue.

The Johnsons also assert a variety of violations by the police in the pretrial handling of the evidence which they contend prejudiced their ability to defend themselves and made the evidence unreliable. Granted, the police violated A.R.Cr.P. Rule 15 by destroying all the marijuana except that saved for testing without first obtaining a court order and making a full report of the circumstances of the seizure and a list of the items seized. To exclude evidence because of a violation of our rules, however, the violation must be "substantial." A.R.Cr.P. Rule 16.2(e). The Johnsons argue this violation was substantial because it prejudiced their ability to defend themselves by denying them the opportunity to examine the plants destroyed to determine their character and quality. The character and quality of the plants would make no difference in a conviction for manufacturing marijuana, when, as here, photographs,

officers' testimony and test samples showed overwhelmingly that the plants seized were marijuana. The Johnsons also argue that the police improperly commingled the marijuana found in the barn and the plants growing on the property. Since all the marijuana was properly admissible, there was likewise no prejudice here.

Finally, the Johnsons contest the chain of custody demonstrated for one of the marijuana samples. The officer who sent the bag of marijuana to the lab testified that he marked and taped the bag before it went to the lab and that it returned as marked after testing. The Johnsons' complaint is that the officer did not record the number assigned to the bag until the submission sheet was made after the return of the evidence from the lab. No evidence of tampering, suspicious circumstances or break in the chain of custody was shown by the Johnsons. It is not necessary that every possibility of tampering be eliminated, but only that the trial judge, in his discretion, is satisfied that the evidence presented is genuine and, in all reasonable probability, has not been tampered with. *Munnerlyn v. State*, 264 Ark. 928, 576 S.W.2d 714 (1979). The judge did not abuse his discretion in this regard.

Affirmed.

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

March 23, 1987

Stephen E. James
Attorney at Law
P.O. Box 351
Clinton, AR 72031

RE: CR 86-159 Raphael Johnson, Ida Johnson and Robert Johnson v. State of Arkansas

Dear Mr. James:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Dona L. Williams, Clerk

DLW:mf

cc: J. Brent Standridge
Maurice Stoltzfus
(Circuit Case #CR85-109-114)

APPENDIX C

SUPREME COURT OF ARKANSAS
NO. CR 86-159
pinion Delivered February 23, 1987

RAPHAEL JOHNSON, IDA JOHNSON, AND ROBERT JOHNSON, ... APPELLANTS,	APPEAL FROM VAN BUREN CIRCUIT COURT, #CR 85-109 TO 85-114; HON. GEORGE F. HARTJE, JUDGE.
VS.	
STATE OF ARKANSAS, ... APPELLEE.	*AFFIRMED.*

POINTS TO BE RELIED UPON

I.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE SEIZED IN A WARRANTLESS SEARCH OF THE DEFENDANTS' PROPERTY WHEN THE LAW ENFORCEMENT OFFICERS FAILED TO MAKE A DILIGENT EFFORT TO OBTAIN A SEARCH WARRANT.

II.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE SEIZED FOLLOWING THE ARREST OF R.S. JOHNSON SINCE NO OTHER EVIDENCE WAS SEIZED INCIDENT TO THE ARREST OF R.S. JOHNSON OR IN PLAIN VIEW OF THE ARRESTING OFFICERS.

III.

THE TRIAL COURT ERRED IN ALLOWING THE EVIDENCE TO BE INTRODUCED BASED ON A INVALID CONSENT TO SEARCH THE DEFENDANTS' PROPERTY.

IV.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS STATE'S TRIAL EXHIBIT #9 DUE TO THE FACT THAT THE LAW ENFORCEMENT OFFICERS FAILED TO SAFEKEEP THE EVIDENCE, COMMINGLED THE EVIDENCE FROM DIFFERENT LOCATIONS, DESTROYED EVIDENCE WITHOUT JUDICIAL AUTHORITY, FAILED TO PRESERVE ADEQUATE SECONDARY EVIDENCE AND FAILED TO MAINTAIN THE CHAIN OF CUSTODY OF THE EVIDENCE ALL OF WHICH SUBSTANTIALLY PREJUDICED THE DEFENDANTS' ABILITY TO ADEQUATELY DEFEND THEMSELVES.

APPENDIX "D"

IN THE CIRCUIT COURT OF
VAN BUREN COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR 85-109-114

RAPHAEL JOHNSON, IDA
JOHNSON, AND ROBERT JOHNSON DEFENDANTS

CONSENT ORDER

On this 14th day of January, 1986, comes on for hearing the oral motion of the defendants to order an independent drug testing laboratory evaluation of an alleged controlled substance seized from the defendants and held as evidence in these cases and from the consent agreement of the prosecuting attorney, ROBERT P. CROCKETT, and the defendants' attorney, STEPHEN E. JAMES, the court finds that the alleged controlled substances being held by the Arkansas State Police as evidence shall be transmitted to American Interplex Corporation, 3400 Asher Avenue, Little Rock, Arkansas for laboratory analysis to determine the quantity, composition, and presence or absence of a controlled substance contained therein and to report its findings to the Court and the attorneys prior to the trial date.

/s/ George Hartje
GEORGE HARTJE, Circuit Judge

APPENDIX "E"

IN THE CIRCUIT COURT OF
VAN BUREN COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR 85-109-114

RAPHAEL JOHNSON, IDA
JOHNSON, AND ROBERT JOHNSON DEFENDANTS

ORDER

On this 25th day of February, 1986 comes on for hearing the motion to suppress of the defendants and the defendants appeared and were represented by their attorney, STEPHEN E. JAMES and the state appeared and was represented by its attorney, ROBERT P. CROCKETT and from the pleadings, the testimony of the witnesses arguments of counsel and brief submitted by the defendants the court finds:

1. That no search warrant was issued to search the property of the defendants;

2. That probable cause existed for the law enforcement officers to enter the property of the defendants, to arrest the defendants for manufacturing and possessing controlled substances located upon the property and seizing certain plants and items used in cultivating said plants;

3. That the law enforcement officers exceeded the scope of the consent search when they entered the defendants home and automobiles, further that no exigent circumstances existed for a warrantless search of these places and all items seized therein should be excluded and suppressed;

4. That the random sample taken by the law enforcement officers was valid and the destruction of the plants by the

state did not prejudice the defendants in preparing their defense;

5. That the chain of custody of proposed evidence marked MLT E-8 was preserved by the law enforcement officers;

IT IS SO ORDERED.

/s/ George Hartje
CIRCUIT JUDGE
March 25, 1986

APPENDIX "F-1"

CROSS EXAMINATION OF LT. C.B. EVANS

Q. How long did it take you before you decided to go out to the Johnsons' place to obtain the helicopter to make an aerial surveillance?

A. I'm not sure that I follow you.

Q. Well, you obviously had the martial—considerable forces, a helicopter and various law enforcement agencies. You didn't do that in one day, did you? About how long was it from the time you got your information until you were ready to go out there and observe the Johnsons' property?

A. Oh, possibly a month. I'm not sure.

Q. A month?

A. I had—I had conversation back and forth with people in Texas two or three times, I guess, and then we had to wait until the helicopter was available.

Q. Did you ever attempt to determine the reliability of their informant? Did you discuss that with them?

A. I didn't discuss their informant at all.

Q. You didn't? Did you know that they had some informant down in Texas?

A. Well, I assumed that they did because they had the information.

Q. Did you consider the possibility of having a search warrant obtained based upon what information the Texas authorities had in order to search the Johnson property?

A. No.

Q. You did not explore that possibility?

A. No.

APPENDIX "F-2"

CROSS EXAMINATION OF LT. C.B. EVANS

Q. When he came up to you or at any time when you got out of the car, did you see him carrying any marijuana plants?

A. Not after he went into the barn.

Q. Did you see him throw down any marijuana plants?

A. No.

Q. Did you inspect the barn later?

A. Yes.

Q. And did you observe anything in the barn other than marijuana?

A. There was quite a—there was tools of different kinds, a tractor or two.

Q. Did you see any other kinds of plants in there?

A. Not that I paid any attention to; not that I recall.

Q. You didn't preserve any plants that you saw laying around that barn?

A. The sheriff retrieved seven marijuana plants laying in the door that goes out on the side of the barn in the

direction that Mr. Johnson was traveling. But I didn't see any myself other than what was dragged in on the lawnmower when it was driven back in there.

Q. At that point what were you arresting Mr. Johnson for?

A. Possession of marijuana.

Q. And the marijuana—which marijuana were you referring to?

A. What he was carrying when we saw him.

APPENDIX "G-1"

DIRECT EXAMINATION OF SGT. M.L. TESTER

Q. Did you subsequently submit another sample of green vegetable matter to the state crime laboratory?

A. Yes, sir, I did on a court order I received from this county for the remains of any evidence that was in this case, and I submitted the rest of the field sample from the Johnson property.

Q. How much green vegetable matter did that consist of?

A. Oh, three point three ounces that was remained in the grocery bag.

Q. Okay. Is this the report that you received pursuant to that?

A. Yes, sir, it is.

MR. CROCKETT: I would ask this report be admitted as State's Exhibit No. 15.

MR. JAMES: Your Honor, I would like to voir dire about this report.

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. JAMES:

Q. Do you have a copy of the court order you're talking about? You said you sent this down.

A. Yes, sir, I do.

Q. Where does it say that you're supposed to send this evidence?

A. This letter is from Mr. Stephen E. James ordering—has a court order for me to submit all the evidence being held in the case to be delivered to American Interplex Corporation at 3400 Asher Avenue, chemist's name Mike Keller—which I did.

Q. And this is the report from Mike Keller?

A. This is the laboratory report from the state crime lab.

Q. Well then, you didn't take it to Mike Keller, you took it to—

A. I took it first—the first random sample that was—that was submitted to Keller. This report is from the lab—state crime lab who your chemist is supposed to pick up from there for analysis.

Q. What you're saying is you got an order telling you to turn it over to an independent testing laboratory and instead of doing that you took it to the state crime laboratory?

A. I did. I did the last.

Q. Yes. This three point three ounces?

A. Yes.

Q. To your knowledge has this order been carried out? Has American Interplex been delivered this particular sample?

A. This last sample?

Q. Yes.

A. Not as I know of.

MR. JAMES: Your Honor, we would object at this time to the introduction of evidence that was not submitted pursuant to the court order that was entered. We don't have a report from American Interplex. We have from somebody here who was not testimony on direct—

MR. CROCKETT: All this officer is testifying to, your Honor, he took the remainder of what he had from which the previous random sample had been taken and submitted it for lab testing.

THE COURT: What's the date of the order?

THE WITNESS: January 14th, sir.

Q. You received it—what date is the letter?

A. January 20th is what you've got it dated here.

Q. Okay. Did you receive it on or about that time?

A. Well, probably.

Q. Day or so after that?

A. Yes, sir.

Q. What was the date you took the evidence down to the state crime laboratory?

A. I took it the—January 27th at 11:34 a.m.

Q. This was the evidence that we're talking about right now, the three point three ounces?

A. Yes, sir.

MR. JAMES: Your Honor, that's what we're objecting to. The Court has a specific order ordering all substances delivered to American Interplex, and now they're trying to introduce a report of some more substance that was not delivered to American Interplex; we don't have a report from American Interplex. We have a chemist, Mike Keller, who will testified he hadn't received it.

THE WITNESS: He had permission, sir, to obtain this evidence, sir, after our state crime lab had analyzed it.

MR. JAMES: The Court can see the court order directs you to take it down there.

THE COURT: What do you say, Mr. Crockett?

MR. CROCKETT: Your Honor, as the witness testified, and the Court heard him, Mike Keller picked all the samples up from the state crime laboratory, and he had permission to pick this very sample right here up.

THE COURT: Is that what you're testifying to?

THE WITNESS: Yes, sir.

THE COURT: Mike Keller has had these items?

THE COURT: Yes, sir.

MR. CROCKETT: I think he testified he had access to the state crime laboratory—

THE WITNESS: He had access—I delivered to him the first two samples, the field sample and the dried sample; I deliverd them to him. The remainder of the outside field

was delivered to the state crime lab and Mr. Keller was told that as soon as they had analyzed it he had permission to analyze it hisself.

Q. So E-4 and E-8, those are the two samples you're talking about?

A. Yes.

Q. Were submitted to the state crime laboratory back in September?

A. Yes.

Q. And then they were sent back to you, weren't they, Officer Tester?

A. Yes, sir.

Q. And you had possession at that time of all the controlled substance since sometime in October, I guess?

A. Yes, sir.

Q. You've had physical control of all these substances except for what the deputy sheriffs have been testifying about today, some other things. But as far as E-4 and E-8 evidence, you had physical possession of it?

A. I did.

Q. And then you received a court order not telling you to take E-4 and E-8 down there but to take all the substances you had in your possession to the American Interplex Corporation. Do I understand your testimony that you did not take all the controlled substances you had in your possession to American Interplex? You did take the two samples that you had already obtained reports from and had received back?

A. This is true.

Q. And to your knowledge up to the present time you have not delivered the substances to American Interplex Corporation?

A. I advised Mr. Keller where the remains was, that he had access to it, to notify Major Quinby Johnson and either someone from the state police would bring it over to him.

MR. JAMES: I think the Court understands the sequence of events.

THE COURT: Now is Mr. Keller out there waiting to testify?

MR. CROCKETT: Yes. That's Steve James; witness.

THE COURT: I want Mr. Tester to step down; I want to hear what Mr. Keller has to say.

MR. JAMES: Your Honor, we're just going to ask Mr. Keller this one particular point.

THE COURT: I'm going to ask him several things, Mr. James.

MR. CROCKETT: That's all the witnesses we had, your Honor.

MR. JAMES: I want to say I didn't have a chance to cross-examine Mr. Tester.

Thereupon,

MICHAEL S. KELLER

having been called for examination by the Court, and having been first duly sworn on oath, was examined and testified as follows:

VOIR DIRE EXAMINATION

BY THE COURT:

Q. State your name and address for the record, please.

A. My name is Michael Keller, address 3400 Asher Avenue, Little Rock, Arkansas.

Q. Mr. Keller, have any quantities of green vegetable material alleged to be marijuana been submitted to you for analysis on behalf of the defendants?

A. Uh, yes, sir, they have.

Q. What?

A. Uh, two particular items. Uh, one—one specimen was labeled as MLT E-4 and the other was labeled as MLT E-8.

Q. Have you had an opportunity to pick up additional specimens or anything like that?

A. Uh, no, sir.

Q. And no one has delivered any specimens to you?

A. No, sir.

THE COURT: Would you like to ask him?

MR. CROCKETT: Just a couple of things.

BY MR. CROCKETT:

Q. Who delivered these two things to you?

A. These two items were delivered by Mr. M.L. Tester.

Q. Did he inform you at that time that there was some more marijuana at the state crime lab being processed that you were to pick up there when it was processed?

A. Uh, yes, sir, he indicated he had dropped one off.

MR. JAMES: Let him finish his answer.

THE WITNESS: I called over to the crime laborabory and talked to the head of the drug section and asked him to give me a call when they had completed the analysis. He indicated that it would be several days before they got to it. I haven't heard back from it.

Q. Did you call back?

A. Uh, no, sir, I didn't.

MR. CROCKETT: No further questions, your Honor.

THE COURT: All right, go ahead.

BY MR. JAMES:

Q. Mr. Keller, as I understand it, they were going to call you and let you know when it was ready?

A. When they completed the analysis; that is correct.

Q. Mr. Keller, before working for American Interplex Corporation were you an employee of the state crime laboratory?

A. Yes, sir, I was employed there for three years.

Q. Three years? And before that were you also an employee of the Arkansas Health Department?

A. Back in, uh, '76 and '77 I was employed at the health department—well, I was employed at the health department from '76 to almost '81.

Q. When did you stop working at the state crime laboratory?

A. In March of '85.

Q. Last March. Would you say you're familiar with the procedures of the state crime laboratory?

A. Yes, sir, for some of the sections.

Q. Are you familiar with the documents they use for keeping and maintaining chain of custody?

A. That is correct.

Q. I'd like to show you an item that the State is proffering as exhibit fifteen and ask if you can tell when that item was processed and when it was apparently available?

A. Uh, this document reflects that this item of evidence was received by the crime lab on January 27, 1986. When it was processed—okay, you've got the report here. Uh, there's a laboratory report reflecting this item of evidence submitted and the date of that report is 2/20/86, last week.

Q. Last week on—

A. That would have been Thursday, something like that.

Q. Were you in your place of employment on Friday?

A. Uh, Friday? I was for, I think, half the day; the other half the day I was out.

Q. Would you receive any messages there—would you have received messages yesterday if you had received a phone call or message from the state crime laboratory to come pick up some evidence?

A. Uh, I would have received a message, yes, if they'd called. I did receive several messages Monday morning when I came in.

Q. Did you get any message to come pick up this sample?

A. No.

MR. JAMES: Your Honor, I continue my objection that even though the Court ordered it—

THE COURT: Well, it's not as bad as I thought it was. It's bad, but it's not as bad.

And you're saying you can tell from that thing, then, the state police just finished with it on the twentieth day of February?

THE WITNESS: Uh, the twentieth day of February was the date of this report, sir.

MR. JAMES: This is another piece of evidence, your Honor, that wasn't submitted until the twenty-seventh of January of this year.

THE COURT: And I don't know why it wasn't. Looks like a lot of bureaucratic doddling along the way.

MR. CROCKETT: If the Court didn't understand, Mr. Tester thought—he just had the rest of this left. He took the previous samples from it and sent it in. He thought when the order came he was supposed to have it analyzed and give it to them also. This is some of the same thing, MLT E-4.

THE COURT: This is a reassessment of—

MR. CROCKETT: It's the rest of the quantity left from the first sample. He just took another random sample out of the bag he had and sent it in. Then when the order came down he sent the rest in.

MR. JAMES: Your Honor, I think that Mr. Crockett is trying to testify here, and we object to that testimony.

THE COURT: I didn't understand Mr. Tester's testimony to be that.

MR. CROCKETT: That's exactly the events that happened, your Honor.

THE COURT: Okay. What I was going to do if I can see evidence of these court orders not being carried out when somebody's freedom is involved or somebody's property is involved or something like that, why I have no qualms against excluding that evidence or dismissing the case or anything else.

The functioning of the judicial system is more important than any defendants you can bring in here, and all police officers should know that. The system is much, much more important than any defendant, and the defendant can walk out of here with the American flag wrapped around him and the judicial system sit here with a black eye because we're protecting our own rights at the same time.

But in this particular instance, if the state police just finished with the thing the twentieth, there's no inordinate delay in passing it on, but it sure has been a stumbling, fumbling thing to get it down there and get it down. But I don't see anything to bring any strict censure or anything like that.

MR. JAMES: We would say that we're prejudiced. We have a hearing we're trying to get ready for today, and we keep getting evidence handed to us right down to the day of the hearing.

THE COURT: This is not a new sample; this is a retesting of a batch you already have one sample out of, and there is not any purposeful non-compliance with the court orders on behalf of the arresting officers or anything like that that you can show. We're running into a stumbling, fumbling bureaucratic attention to details is the way I can see it, not any particular effort to see that the defendants rights are not looked after.

MR. CROCKETT: Your Honor, I'm certain Officer Tester did not have intentions of circumventing your court order by any means.

MR. JAMES: These defendants have hired a private testing laboratory is because they didn't believe the results and the nature of the evidence that we were being informed that the State had against them.

THE COURT: What do you say these plants were?

MR. JAMES: Well, your Honor, we don't know until—

MR. CROCKETT: Your Honor, wait a minute, he does know because their—their chemist has tested these things twice already and found they were marijuana.

MR. JAMES: We will stipulate that the original MLT E-4 and the original MLT E-8 have been positive for

marijuana. That is in this chemist's report, and we do not challenge the State or the chemist's report on the original test.

MR. CROCKETT: We withdraw this exhibit then.

THE COURT: I'm not going to take any action insofar as refusing to allow that sample to be introduced as I was clearly planning to do or what you led me to believe originally, Mr. James. But I see it is not so, not necessarily that way. So, with that, Mr. Crockett, do you have any further questions to ask this—

MR. CROCKETT: No, sir, sure don't.

THE COURT: Do you have questions on that subject or any other?

MR. JAMES: On others.

APPENDIX "G-2"

BY MR. CROCKETT:

Q. Officer Tester, where did you get the last sampling of marijuana that you sent to the lab?

A. The last sampling of marijuana was the remains of E-8 that I did not sent the first time.

Q. Okay. Then the first one you sent, MLT E-8, was a portion of this last batch that you sent in?

A. That's true.

THE COURT: That's good.

APPENDIX "H"

CROSS EXAMINATION OF SGT. M.L. TESTER

Q. I believe you testified that you made some kind of random sample. Would you just explain to the Court what you did with this marijuana, this marijuana that you're identifying as, I believe, MLT E-4 and MLT E-8, especially eight.

A. The random sample consists of samples from the pickup truck which we brought the marijuana in to the county jail before we burned it, and there was samples taken from all over the whole load of marijuana. We just reached and picked off some and put it in a paper bag.

Q. Where did that marijuana come from?

A. Come from the Johnson property.

Q. Was it growing marijuana that was standing out there in the garden?

A. Yes, and there was a bundle that had a string tied around it; I remember that.

Q. A bundle that had—

A. —a string.

Q. Was it out there in the field with the other marijuana?

A. Uh, no. The marijuana that was—had the string on it was up by, uh, best I recall, it was up by the shed; it laid there most of the day.

Q. Uh-huh. Now what did you do with all that marijuana?

A. Burned it.

Q. All right. And the marijuana with the string on it got burned up with the rest of it?

A. Yes, sir.

Q. So we don't have any of that left today to test because it was burned up?

A. We have—I took samples from it also with the other.

Q. What did you do? Did you co-mingle that in with the other?

A. I sure did, put it all together.

Q. Okay, are we talking about MLT E-4 and MLT E-8? Is that what we're talking about?

A. We're talking about MLT E-8.

Q. All right. You took samples from all those little plants out there. Did you take a sample from each plant?

A. No, I don't believe it was from each thousand fifteen plants.

Q. How many growing plants were there?

A. I was told that there was a thousand fifteen, I believe it was.

Q. Growing plants. I believe that's what's been given to me in information. And you burned that thousand fifteen?

A. I didn't. It was burned by the sheriff's department here.

Q. Were you present when it was destroyed?

A. Yes, sir.

Q. Did they have any court order authorizing destruction of this evidence?

A. I do not know.

Q. To your knowledge?

A. I do not know.

Q. I understand that to be a negative answer. To your knowledge they didn't have a court order?

A. I do not know.

Q. But you were in custody of those plants at that point in time, weren't you, when you were at the jail?

A. I rode in with the plants, yes, sir.

Q. And they were given into your possession because it seems you were the person that made—

A. Opened the case on it.

Q. You're the one that opened the case on it, and you're the one that identified with your initials MLT E-8?

A. Yes, sir.

Q. You didn't actually personally see any of these plants before you were called upon the property, did you?

A. No, sir.

Q. You weren't in plain view of any of these plants before the arrest of these defendants?

A. No, sir, I was not.

Q. Now would you tell me how you made a random sample? Would you describe your random sample, how you made it?

A. I just simply pulled the leaves and tops from the plants.

Q. Now, officer, was there a whole plant there? We're talking about the stalk, the stem, the roots, the branches, all parts of it, seeds and everything?

A. Sure.

Q. Did you keep one representative plant, whole plant?

A. No.

Q. Did you keep any part of those plants that—other than the leaves off of the plants?

A. No, sir.

Q. Why did you just pick the leaves?

A. What else were there to pick?

Q. Well, there are stems and stalks and roots and seeds, I believe.

A. We don't send no roots for analysis.

Q. What about the stems and stalks and the seeds?

A. We don't sent them for analysis.

Q. Why is that?

A. We just don't ever do it.

Q. What you're saying is that you didn't just randomly pull pieces of evidence off of there and stick them in a bag. You selectively picked parts of the plants?

A. I just randomly sampled – took the leaves from the marijuana plants, put them in a brown grocery bag, dried them and took them to Little Rock for analysis.

Q. And you didn't keep one whole plant?

A. No, sir.

Q. Did you take a photograph of those plants that you sampled?

A. Yeah, there were photographs made of them.

Q. Do you have those?

A. I do not.

Q. We haven't been given any in evidence as yet by the State. I think there is one we objected to, State's Exhibit 6 shows some plants laying on the ground out there. Can you say with any degree of accuracy that you personally picked a leaf off of any of the plants in that photograph and sampled it?

A. No, I cannot.

RECROSS EXAMINATION

BY MR. JAMES:

Q. Why would you take – as I understand it, the latest portion we have seen the report recently on is about three and a third ounces. We're not talking about very much

marijuana here, are we? We're talking about a handful; isn't that right?

A. We're talking about three and a half ounces.

Q. Not something that's too cumbersome to transport to the drug laboratory in Little Rock; am I correct?

A. We try to avoid in a situation like this taking all of it.

Q. Why?

A. Simply by mailing. We've got an evidence vault in Little Rock. If they don't mail it back, we've got to go down there and spend the day getting it, picking it up from the state police.

Q. Don't they have room for four point eight ounces?

A. Probably do.

Q. Don't you take routinely samples of more than four point eight ounces?

A. Sometimes we do.

Q. So what you're saying is that your random sample that you took here you further refined that sample and made a smaller sample of it of about one and a half ounces and sent it down to the state crime laboratory?

A. Yes, sir.

Q. Why? Why not send it all?

A. Well, I just didn't—I just took out a small portion of it to dry. It has to be dried before we can package it and send it to Little Rock for analysis.

Q. Why does it have to be dried?

A. They don't want it green, it mildews.

Q. And also it's got water in it and water is not a controlled substance. Would you say that's probably another reason?

A. According to what the water's got in it, I guess.

MR. JAMES: Okay, all right. I have no more questions, your Honor.

APPENDIX "I"

COURT RULING

THE COURT: Do you still want to look at the last sample that's down there?

MR. JAMES: Yes, sir, if the State will produce it we would.

THE COURT: Have you any idea?

MR. CROCKETT: All Mr. Keller has to do is go get it or call the state police to bring it to him.

THE COURT: I want to direct the state police to take it to him and I want him to have it by Friday of this week.

MR. CROCKETT: I will so direct them.

THE COURT: How long will it take you to test this?

THE WITNESS: I should be able to do it in one day.

THE COURT: We'll want a report no later than Friday of the following week and have that thing returned to us. Don't let this thing hang on like it has before.

MR. CROCKETT: I don't see any reason he took the last sample down.

THE COURT: I don't either, but it's done now.

MR. CROCKETT: We'll do it, your Honor.

APPENDIX "J"

COURT RULING

MR. JAMES: Your Honor, I understand the Court's ruling that would seem to apply only to the evidence seized in an automobile or in a house?

THE COURT: Yes, sir.

MR. JAMES: As to the evidence seized outside the home, we have some testimony about random sampling; we have testimony about—I believe what the Court has heard is plain view seizures. These aren't really searches; it's the plain view doctrine. I have briefed this issue along with the other issues in a brief in the file.

One of the things required of a plain view search is that the view taken be inadvertent, and we strongly urge the Court that there seems to be a doubt—we seem to have raised a doubt in the mind, I hope, of the Court.

THE COURT: I don't think inadvertence is the test. It's whether or not the officer has the right to be where he is.

MR. CROCKETT: There's several cases Mr. James found that say inadvertent.

THE COURT: That would be good; that's one of the ways a officer can get there.

MR. JAMES: Your Honor, the cases clearly make a three pronged test, and it is that the officer had a right to be there, that the item was inadvertently found and that the thing that was seized was obviously contraband or subject to seizure. Those are the three things in all plain view cases be determined.

THE COURT: Let me make the finding of fact that the two officers saw the defendant Raphael Johnson with

marijuana in his arms, that they were on a public highway at the time they saw that. They were justified in going on his property to ascertain what in the world he was doing with the marijuana, and from the testimony I have heard today, they were rightfully on the property when they saw the garden or part thereof that yielded one thousand fifteen or sixteen plants.

Now, insofar as a random sampling is concerned, the state trooper testified he took marijuana from several places from the back of a half ton truck where those thousand fifteen or sixteen plants had been accumulated and the sampling is sufficient. And the fact that he took leaves, that's where the kicker in the marijuana is is in the leaves. It's not in the stems or stalks or roots. Nobody smokes stems, stalks or roots, they smoke leaves. So that was a good sample.

What else, Mr. James.

MR. JAMES: Well, your Honor, they failed to preserve the chain of custody of MLT E-8, which is the sample of those leaves.

THE COURT: From what I understood and what I understand of the chain of custody, there is no cut and dried manner which it has to be done. The question is was there an opportunity for somebody to substitute the marijuana or to fool with the evidence, and the Court finds none. The chain of evidence is reasonably complete in my mind. The fact he waited and held it in his possession for months before he sent it down does not break the chain of custody.

MR. JAMES: Also, rule 15.4 requires the taking, other than with a search warrant, that there still has to be a report made to the Court, and the testimony was no report was made of the items seized to this Court.

MR. CROCKETT: That does say that, your Honor, I'll admit that. But, also, the cases thereunder say it's directly—

THE COURT: I think the burden is on you to show prejudice.

MR. JAMES: Well, the prejudice is all the evidence was destroyed except for the small few ounces maintained and selected by the police officers. The defendants could not and have been completely precluded from having any test taken of any of the evidence seized and destroyed, and, your Honor, they're charged with not only manufacturing but possession with intent to sell.

And the Court understands that not only—both of those charges one of the burdens—one of the State's burdens is to establish the—not only the character but the amount of controlled substance that was in their possession. And that has to do with enhancement of the penalties in a manufacturing case and in a case of possession; it has to do with whether or not it creates the presumption. And since the State has elected to destroy the evidence without making a report, we would certainly strongly urge the Court that the defense has been prejudiced in this case, and there is no way to remedy it other than to suppress those items that remain—

THE COURT: The Court doesn't find any prejudice in the action of the officers in taking the random sample and destroying the mass of marijuana that they had.

APPENDIX "K"

DIRECT EXAMINATION OF SGT. M.L. TESTER—TRIAL

Q. As far as outside—let's talk about the outside.

A. Outside I taken random samples from the plants for the laboratory.

Q. All right, sir, and how did you go about doing that?

A. Just after we pulled the plants, I just taken samples from as many plants as I possibly could on the truck.

Q. All right. Is that customary rather than save the whole big load just to take random samples of the plants?

A. Yes, sir.

Q. What did you do with it?

A. I dried it, took it to the lab for analysis.

Q. The Arkansas State Crime Laboratory?

A. Yes, sir.

MR. BRAZIL: I'm going to mark this envelope as State's Exhibit No. 9—

Q. —and ask you, number one, if you recognize the envelope?

A. I do.

Q. All right. Have your initials and date on it?

A. Yes, sir.

Q. Do you have a pocket knife?

A. I do.

Q. I got mine open; it's easier. Would you open it up and tell me whether or not that appears to be the samples that you took?

A. This is—inside this bag will be processed marijuana.

Q. Right.

A. This is marijuana inside. This is the envelope we put the marijuana in.

Q. All right. There's not another envelope in there?

A. No, sir, there is not.

Q. So if we open that we'll have marijuana spilling out?

A. Yes, sir.

Q. And this is the bag that you put it in and submitted it to the crime lab?

A. That's the date, case file number and my initials on it.

Q. MLT E-8?

A. That's a portion of E-8.

Q. Samples?

A. Yes.

MR. BRAZIL: We'd offer this, subject to further connection, as State's Exhibit No. 9.

THE COURT: Will there be objection?

MR. JAMES: None other than the ones we've already submitted to the Court at previous hearings.

THE COURT: Let it be admitted.